

3-1-1976

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## Recommended Citation

James E. Gleason Jr. and Dennis K. Poole, *IRS Summary Assessment Powers: Abuse and Control*, 1976 BYU L. Rev. 233 (1976).  
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1976/iss1/4>

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## IRS Summary Assessment Powers: Abuse and Control

The jeopardy and termination assessment powers of the Internal Revenue Service, shielded by the anti-injunction provision of the Code, give the IRS virtually unfettered power to seize all of a taxpayer's assets in satisfaction of an alleged tax liability. This comment will examine the current statutory scheme providing for these summary assessment powers, including existing taxpayer remedies, and reevaluate the constitutionality of summary assessment procedures. Recent abuses of the powers will be reviewed, followed by a discussion of alternative methods of controlling them. Finally, the most recent attempt at control, the 1975 summary assessment reform bill, will be considered in some detail.

### I. BACKGROUND: THE SUMMARY ASSESSMENT POWERS

#### A. *Assessment Procedures*

##### 1. *Normal assessment procedures*

Under normal IRS assessment and collection procedures,<sup>1</sup> a taxpayer has ample notice that the Commissioner proposes to assess and collect additional taxes from him. In fact, after informally notifying the taxpayer that more tax is owed, the IRS will usually attempt to negotiate a settlement with him.<sup>2</sup> If settlement negotiations reach an impasse, the district director<sup>3</sup> will issue a statutory notice of deficiency, or "90-day letter,"<sup>4</sup> informing the taxpayer of the amount of the deficiency the director intends to formally assess and collect. The director is prohibited from proceeding further with the assessment or collection of the tax until

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1. The normal IRS procedures for assessment of taxes deemed owing the federal government are found in INT. REV. CODE OF 1954, §§ 6211-15. The general provisions on collection are found in INT. REV. CODE OF 1954, §§ 6301-03, and the provisions on seizure of property for the collection of taxes are found in INT. REV. CODE OF 1954, §§ 6331-43.

2. In the fiscal year ending June 30, 1974, for example, a total of 2,187,864 returns were examined by the audit division of the IRS, which proposed additional taxes and penalties amounting to \$5,909,198. Of these, only 8,799 cases resulted in petitions to the Tax Court, and only 1,133 produced refund suits in the district courts and the Court of Claims. 1974 COMM'R OF INT. REV. ANN. REP. 39-41, 102-03.

3. While most of the Code provisions specify that the action required by them shall be taken by "the Secretary of the Treasury or his delegate," as a practical matter, most such functions are carried out by "his delegate," the local district director of the Internal Revenue Service. See, e.g., Treas. Reg. §§ 301.6861-1(a) (1961), 301.6851-1(a) (1959).

4. INT. REV. CODE OF 1954, § 6213(a).

the end of the 90-day period following notification.<sup>5</sup> During the 90-day period the taxpayer may: (1) accept the deficiency and pay the tax, (2) pay the tax and sue for a refund in a United States district court,<sup>6</sup> or (3) before paying any of the tax, petition the Tax Court for a redetermination of the alleged deficiency.<sup>7</sup> By petitioning the Tax Court, the taxpayer further forestalls IRS collection activities until the decision of the Tax Court becomes final.<sup>8</sup> Only after expiration of the 90-day period, and conclusion of Tax Court litigation and appeals therefrom, may the IRS make its assessment and formal demand for payment.<sup>9</sup> The taxpayer is then given a 10-day grace period before the IRS can levy on his property.<sup>10</sup>

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5. *Id.* Any attempt by the district director to assess or collect the alleged deficiency during the 90-day period may be enjoined, notwithstanding the anti-injunction provisions of INT. REV. CODE OF 1954, § 7421(a), by a proceeding in the proper court. *Butler v. District Director of Internal Revenue*, 369 F. Supp. 1281, 1282 (S.D. Tex. 1973). See *Walker v. IRS*, 333 F.2d 768, 770 (9th Cir. 1964), *cert. denied*, 380 U.S. 926 (1965); *Sturgeon v. Schuster*, 158 F.2d 811, 813 (10th Cir.), *cert. denied*, 331 U.S. 817 (1947).

6. INT. REV. CODE OF 1954, §§ 6532, 7422. See notes 71-80 and accompanying text *infra*.

7. The 90-day letter is in fact a jurisdictional prerequisite to litigation in the Tax Court, and as such has been termed the taxpayer's "ticket" to the Tax Court. *Corbett v. Frank*, 293 F.2d 501, 502 (9th Cir. 1961).

8. INT. REV. CODE OF 1954, § 6213(a) provides in pertinent part:

Except as otherwise provided in section 6861 [the jeopardy assessment provision] no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 or 43 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice [the 90-day letter] has been mailed to the taxpayer, nor until the expiration of such 90-day . . . period, . . . nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.

9. *Id.* Assessment gives rise to a lien on "all property and rights to property, whether real or personal" of the taxpayer. INT. REV. CODE OF 1954, § 6321.

10. INT. REV. CODE OF 1954, § 6331(a) provides in pertinent part:

If any person liable to pay any tax neglects or refuses to pay the same *within 10 days after notice and demand*, it shall be lawful for the Secretary or his delegate to collect the tax . . . by levy . . .

*Id.* (emphasis added). INT. REV. CODE OF 1954, § 6334(a) lists the property exempt from levy:

(1) Wearing apparel and school books.

Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) Fuel, provisions, furniture, and personal effects.

If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed \$500 in value;

(3) Books and tools of a trade, business, or profession.

So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate \$250 in value.

Under special circumstances, however, the IRS is empowered to bypass these normal procedures for notice and prepayment hearing, moving immediately to assessment, demand for payment, and collection by seizure of the taxpayer's assets. These summary procedures are of two basic types: jeopardy assessments<sup>11</sup> and termination assessments.<sup>12</sup>

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(4) Unemployment benefits.

Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State, or of the District of Columbia or of the Commonwealth of Puerto Rico.

(5) Undelivered mail.

Mail, addressed to any person, which has not been delivered to the addressee.

(6) Certain annuity and pension payments.

Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor Roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) Workmen's compensation.

Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) Salary, wages, or other income.

If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

As stated at 7 RESEARCH INSTITUTE TAX COORDINATOR ¶ V-5201:

*Except for the above enumerated exceptions, no property is exempt from levy.*

*This means that no provision of state law may exempt property or rights to property from levy for the collection of any federal tax.*

*The mere fact that certain property is exempt from levy and execution under state law does not mean that it is exempt from federal levy.*

*For instance, property exempt from execution under state personal or homestead exemption law is, nevertheless, subject to levy by the United States for collection of its taxes. And property of a deceased taxpayer set aside for a year's support of widow and minor children under state law . . . also has been held to be subject to levy.*

*Id.* (citations omitted).

11. INT. REV. CODE OF 1954, §§ 6861 (jeopardy assessment of income, estate, gift, and certain excise taxes), 6862 (jeopardy assessment of all other taxes). *See generally* Hochman & Tack, *Jeopardy Assessments—A System in Jeopardy*, 45 TAXES 418 (1967); Note, *Jeopardy Assessment: The Sovereign's Stranglehold*, 55 GEO. L.J. 701 (1967) [hereinafter cited as *Stranglehold*].

12. INT. REV. CODE OF 1954, § 6851. *See generally* Peale, *Termination of Taxable Year*, 52 TAXES 305 (1974); Comment, *Code Section 6851—"Termination of Taxable*

## 2. *The jeopardy assessment power*

Under sections 6861<sup>13</sup> (income, estate, gift, and certain excise taxes) and 6862<sup>14</sup> (all other taxes) of the 1954 Code, if the district director "believes that the assessment or collection of a deficiency . . . will be jeopardized by delay, he shall . . . immediately assess" and collect the deficiency.<sup>15</sup> A jeopardy assessment is only appropriate after expiration of the taxpayer's tax period and the determination of a deficiency.<sup>16</sup>

By invoking the jeopardy assessment power, the IRS may make an immediate assessment and demand for payment, without prior notice to the taxpayer.<sup>17</sup> Typically, the taxpayer is unable to immediately tender payment of the full jeopardy assessment. Furthermore, because the jeopardy assessment power is

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*Year*"—*Application and Function Within the Internal Revenue Code of 1954*, 9 WAKE FOREST L. REV. 381 (1973); Note, *Termination of Taxable Year: Procedures in Jeopardy*, 26 TAX L. REV. 829 (1971); Note, *Termination of Taxable Years: The Quagmire of Internal Revenue Code Section 6851*, 15 WM. & MARY L. REV. 658 (1974).

13. INT. REV. CODE OF 1954, § 6861(a) provides:

(a) Authority for Making.

If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

14. INT. REV. CODE OF 1954, § 6862(a) states the essence of the jeopardy assessment power:

(a) Immediate Assessment.

If the Secretary or his delegate believes that the collection of any tax (other than income tax, estate tax, and gift tax) under any provision of the internal revenue laws will be jeopardized by delay, he shall, whether or not the time otherwise prescribed by law for making return and paying such tax has expired, immediately assess such tax (together with all interest, additional amounts, and additions to the tax provided for by law). Such tax, additions to the tax, and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Secretary or his delegate for the payment thereof.

15. INT. REV. CODE OF 1954, § 6861(a); see note 13 *supra*.

16. Note that § 6861(a) (income, estate, gift, and certain excise taxes), quoted in full in note 13 *supra*, applies only to the summary collection of a deficiency. INT. REV. CODE OF 1954, § 6861(a). The IRS had interpreted this to mean an amount owing after the taxpayer's tax year or quarter had ended. See, e.g., *Laing v. United States*, 96 S. Ct. 473, 476, 480 (1976) (argument of IRS). *Laing v. United States* nevertheless held that the assessment authority of § 6861 is necessarily referred to by § 6851 (termination of taxable year). Section 6862, on the other hand, specifically states that it is applicable to the collection of any tax (other than income, estate, and gift taxes), "whether or not the time otherwise prescribed by law for making return and paying such tax has expired . . . ."

17. INT. REV. CODE OF 1954, § 6861.

necessary in situations in which delay may endanger the collection of the revenue,<sup>18</sup> the 10-day grace period prior to levy does not apply,<sup>19</sup> and assessment, demand for payment, and seizure<sup>20</sup> of the taxpayer's property in satisfaction of the assessment can be virtually simultaneous.<sup>21</sup> The ultimate effect on the taxpayer may be disastrous, rendering him impecunious<sup>22</sup> and often permanently ruining his business.<sup>23</sup>

The statutory notice of deficiency, or 90-day letter, which ordinarily precedes and forestalls assessment and collection, is still required in the jeopardy assessment context, but need only be sent<sup>24</sup> within 60 days *after* the jeopardy assessment has been made.<sup>25</sup> While failure to send the 90-day letter within 60 days

18. INT. REV. CODE OF 1954, § 6861(a) expressly provides that "[i]f the Secretary or his delegate believes that the assessment or collection of a deficiency . . . *will be jeopardized by delay*" a jeopardy assessment should be made. (Emphasis added.)

19. INT. REV. CODE OF 1954, § 6331(a) provides:

If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

20. Failure or refusal to pay the tax as assessed and demanded gives rise to a federal tax lien under INT. REV. CODE OF 1954, § 6321:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

The Internal Revenue Manual provides, in its instructions to agents, that

[i]f . . . it is determined that the filing of the notices of Federal tax lien will not provide the degree of protection necessary to ensure that the taxpayer will not dispose of, dissipate or secrete certain types of personal property, action should be initiated to levy upon such assets.

CCH INT. REV. MANUAL § 5213.24(1) (1974). The provisions on levy and sale of taxpayer property for the collection of taxes are found in INT. REV. CODE OF 1954, §§ 6331-44.

21. The district director for Arizona is quoted as giving the following instructions to his field personnel:

When we are in possession of facts which warrant such action . . . procedures will be developed so that [summary assessments] can be made in less than two hours. . . . Emergency situations may be handled orally and covered thereafter by written reports.

Silver, *Terminating the taxpayer's taxable year: How IRS uses it against narcotics suspects*, 40 J. TAXATION 110 (1974).

22. See, e.g., *Lloyd v. Patterson*, 242 F.2d 742 (5th Cir. 1957).

23. See, e.g., *Kimmel v. Tomlinson*, 151 F. Supp. 901, 902 (S.D. Fla. 1957).

24. The statutory notice of deficiency must be sent by certified or registered mail. INT. REV. CODE OF 1954, § 6212(a).

25. INT. REV. CODE OF 1954, § 6861(b).

renders the jeopardy assessment invalid and therefore subject to injunction,<sup>26</sup> this remedy does little to protect the hapless taxpayer, since the IRS can make successive jeopardy assessments until the statute of limitations has run.<sup>27</sup> Further, the Commissioner will not be estopped from later changing the amount of the deficiency originally claimed in the 90-day letter.<sup>28</sup> Hence, the only real value of the 90-day letter to the taxpayer is its function as the prerequisite to litigation in the Tax Court.<sup>29</sup>

During the 90-day period, the IRS holds the taxpayer's seized property. The property may be sold after the statutory notice of deficiency has been issued and the taxpayer's 90-day period for filing his petition in the Tax Court has expired. If the taxpayer does timely petition the Tax Court, sale of the seized property is stayed pending the outcome of the Tax Court proceeding and any appeals therefrom.<sup>30</sup>

### 3. *Termination assessments*

As mentioned earlier, the jeopardy assessment power may only be exercised after the normal expiration of the taxable year.<sup>31</sup> Occasionally, however, the Service discovers that collection of the current year's tax will be jeopardized by waiting until the end of the year. Hence, section 6851 provides that the Service must immediately declare the taxpayer's taxable year terminated and determine his tax liability for the shorter period,

[i]f the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove

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26. *United States v. Lehigh*, 201 F. Supp. 224, 228 (W.D. Ark. 1961); *Berry v. Westover*, 70 F. Supp. 537, 546 (S.D. Cal. 1947); *Dinwiddie Lampton*, 17 B.T.A. 649, 652 (1929); *G.H. Connell*, 15 B.T.A. 1309 (1929); *J.H. Reese*, 15 B.T.A. 1261 (1929). *See United States v. Ball*, 326 F.2d 898, 901 (4th Cir. 1964); *United States v. Martin*, 395 F. Supp. 954, 958 (S.D.N.Y. 1975); *United States v. Ahrens*, 394 F. Supp. 531, 540 (W.D. Ark. 1975).

27. *Berry v. Westover*, 70 F. Supp. 537, 546 (S.D. Cal. 1947); *W. Cleve Stokes*, 22 T.C. 415, 422-23 (1954).

28. INT. REV. CODE OF 1954, § 6861(c) expressly provides:

The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of section 6212 (c) prohibiting the determination of additional deficiencies, and whether or not the taxpayer has theretofore filed a petition with the Tax Court.

29. *See* note 7 *supra*.

30. INT. REV. CODE OF 1954, § 6863(b)(3)(A). Notwithstanding this stay, the seized property may be sold if the taxpayer consents to the sale or if the property is perishable or unduly expensive to maintain. INT. REV. CODE OF 1954, § 6863(b)(3)(B).

31. Note 16 and accompanying text *supra*.

his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partially ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay . . . .<sup>32</sup>

The tax computed becomes immediately due and payable, just as if the taxable year had come to a normal close, and the Service must demand immediate payment.<sup>33</sup> As in the case of jeopardy assessments, the taxpayer is purposely taken by surprise and generally cannot immediately tender the amount assessed. Therefore, in most cases, the Service exercises its power to seize his property in satisfaction of the termination assessment.<sup>34</sup>

Until recently, a termination assessment was thought to be considerably more onerous than a jeopardy assessment because the IRS asserted that section 6861, which requires issuance of a 90-day letter within 60 days of a jeopardy assessment, did not apply to termination assessments.<sup>35</sup> Hence, at the earliest, the IRS would send a 90-day letter to the taxpayer at the end of his taxable year,<sup>36</sup> but could conceivably wait until the three-year statute of limitations had run following the close of his taxable year.<sup>37</sup>

The Commissioner's interpretation was recently invalidated

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32. INT. REV. CODE OF 1954, § 6851(a)(1).

33. *Id.*

34. The IRS draws its authority to immediately levy on the property of a termination-assessed or jeopardy-assessed taxpayer from the same source: INT. REV. CODE OF 1954, § 6331(a), quoted in pertinent part in note 19 *supra*. As with a jeopardy assessment, a termination assessment involves a "finding that the collection of . . . tax is in jeopardy," and the 10-day grace period for payment does not apply. *Id.*

35. *Laing v. United States*, 496 F.2d 853 (2d Cir. 1974), *rev'd*, 96 S. Ct. 473 (1976); *Irving v. Gray*, 479 F.2d 20 (2d Cir. 1973); *Williamson v. United States*, 31 Am. Fed. Tax R.2d 800 (7th Cir. 1971). *Contra*, *Clark v. Campbell*, 501 F.2d 108 (5th Cir. 1974); *Rambo v. United States*, 492 F.2d 1060 (6th Cir. 1974), *cert. denied*, 96 S. Ct. 886 (1976). See note 16 *supra*.

As discussed in note 7 *supra*, the 90-day letter is a prerequisite to Tax Court jurisdiction. Thus, as long as the IRS delays sending the 90-day letter, the taxpayer is barred from petitioning the Tax Court.

36. The final tax liability cannot actually be determined until the end of the taxpayer's taxable year. Because either the taxpayer or the IRS can reopen the question of liability at any time until the end of the year, any mid-year "deficiency" is effectively meaningless.

37. INT. REV. CODE OF 1954, § 6501(a) provides that the Service must make its assessment within three years of the date the return is filed for the full year. This gives the IRS three years in which to complete its audit. Note, *Termination of Taxable Years: The Quagmire of Internal Revenue Code Section 6851*, 15 WM. & MARY L. REV. 658, 661 n.19 (1974). For further discussion of the problems confronting a termination-assessed taxpayer see Note, *Section 6851 Termination of A Taxable Year: The Search for A Taxpayer Remedy*, 24 DRAKE L. REV. 683 (1975).



by the Supreme Court in *Laing v. United States*,<sup>38</sup> where it was held that termination of a tax year gives rise to a deficiency and that any subsequent summary assessment must be made pursuant to section 6861 jeopardy assessment procedures.<sup>39</sup> Thus, it is now clear that the 90-day letter must be sent within 60 days after a jeopardy assessment following either termination or normal expiration of a taxable year.<sup>40</sup>

## B. Summary Assessment and the Constitution

### 1. The Phillips doctrine

Jeopardy and termination assessments clearly involve a deprivation of property without the prior notice and hearing ordinarily required by the Constitution.<sup>41</sup> The Supreme Court, however, has consistently sustained the use of these summary powers, citing the taxpayer's right to either petition the Tax Court for a subsequent redetermination of his tax liability or pay the tax and sue for a refund as satisfying due process requirements. Decisions upholding the summary powers generally rely on the Supreme Court's reasoning in *Phillips v. Commissioner*,<sup>42</sup> which upheld the constitutionality of an early version of the jeopardy assessment power.<sup>43</sup> In *Phillips* the Court recognized the superiority of the sovereign's right to collect the revenues over an individual's right to notice and a hearing prior to seizure of his property, and concluded that "[w]here, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obliga-

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38. 96 S. Ct. 473 (1976).

39. *Id.* at 485.

40. INT. REV. CODE OF 1954, § 6861(b).

41. See notes 46-51 and accompanying text *infra*. The Fifth Amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

In addition to the due process issue, the taxpayer whose entire assets have been seized may find himself deprived of effective representation because of his inability to hire counsel. *Stranglehold*, *supra* note 11, at 731.

This problem may even reach Sixth Amendment proportions in cases in which criminal penalties may be imposed, *Stranglehold*, *supra* note 11, at 731-32 & nn.196-200, or in which subsequent criminal prosecutions may be affected by the outcome of the civil tax proceeding, *id.* at 732.

Under certain circumstances, the jeopardy-assessed taxpayer may also require, but be unable to afford, the services of a qualified accountant. See Comment, *Taxpayer's Constitutional Right to an Accountant in a Net Worth Prosecution After Being Rendered Indigent by a Jeopardy Assessment*, 52 NW. U.L. REV. 808 (1958).

42. 283 U.S. 589 (1931).

43. Revenue Act of 1926, ch. 27, §§ 279, 280(a)(1), 44 Stat. 9, 61.

tion to the government have been consistently sustained."<sup>44</sup> Since *Phillips*, the few suits which have attacked the jeopardy assessment power on constitutional grounds have been uniformly unsuccessful.<sup>45</sup>

Recently, some taxpayers have challenged the summary assessment powers on the authority of a new series of Supreme Court cases dealing with the constitutionality of creditors' prejudgment attachment and garnishment remedies.<sup>46</sup> Upon reexamining traditional notions of procedural due process, the Court announced in *Sniadach v. Family Finance Corp.*<sup>47</sup> and *Fuentes v. Shevin*<sup>48</sup> that, except in a few extraordinary circumstances involving important governmental interests,<sup>49</sup> state-authorized prejudgment seizure of significant property interests must be preceded by notice and opportunity for a hearing.<sup>50</sup> Unfortunately for jeopardy- and termination-assessed taxpayers, the Court in *Fuentes* identified as one of those extraordinary circumstances

44. 283 U.S. at 595. The Court further held that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Id.* at 596-97. The Court then suggested two alternative methods of judicial review: (1) refund litigation or (2) redetermination of liability by the Board of Tax Appeals. *Id.* at 597-98.

45. *See, e.g., Continental Prods. Co. v. Commissioner*, 66 F.2d 434, 435-36 (1st Cir. 1933); *Communist Party of United States v. Moysey*, 141 F. Supp. 332, 339-40 (S.D.N.Y. 1956).

46. *See, e.g., Matthews v. United States*, 74-1 U.S. Tax Cas. ¶ 9346 (S.D. Tex. 1974). *See also McGee v. United States*, 380 F. Supp. 801, 804 (N.D. Ind. 1974); *Preble v. United States*, 376 F. Supp. 1369, 1372 (D. Mass. 1974); *Commonwealth Dev. Ass'n v. United States*, 365 F. Supp. 792, 796 (M.D. Pa. 1973), *aff'd*, 503 F.2d 1398 (3rd Cir. 1974).

47. 395 U.S. 337 (1969).

48. 407 U.S. 67 (1972).

49. *Id.* at 90-92; *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969). The Court stated in *Fuentes*:

There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

407 U.S. at 90-91 (citations omitted). Given the broad discretion granted to the district director, and the failure to provide adequate standards to circumscribe his exercise of that discretion, the statutory provisions governing summary assessments do not appear to be "narrowly drawn."

50. 407 U.S. at 90-91; 395 U.S. at 339. *See Note, Procedural Due Process—The Prior Hearing Rule and the Demise of Ex Parte Remedies*, 53 Bost. U.L. REV. 41 (1973).

involving important governmental interests, the "summary seizure of property to collect the internal revenue of the United States . . .," citing, and implicitly reaffirming, *Phillips*.<sup>51</sup>

## 2. A second look at Phillips

As noted earlier, the *Phillips* rationale, which subsequent decisions have uniformly cited as controlling,<sup>52</sup> is that the opportunity for a post-seizure judicial redetermination of tax liability affords a jeopardy-assessed taxpayer adequate due process protection.<sup>53</sup> There is, however, a critical weakness in this rationale. The Tax Court's (or in the case of a refund suit, the district court's or Court of Claims') review of a summary assessment is no different from its review of a normal assessment; that is, the court reviews only the amount of the tax liability, and does not consider whether or not jeopardy actually existed.<sup>54</sup> Indeed, courts have held that the district director's jeopardy determination is generally nonreviewable.<sup>55</sup> Also, in the case of termination assessments, the statute expressly declares the director's determination to be presumptively correct.<sup>56</sup> Thus, the taxpayer who, as a result of a jeopardy assessment, has been impoverished overnight and often has had his business permanently ruined, is unable to obtain *any* judicial review of the jeopardy determination which was originally responsible for his hardship. Seen in this light, the Supreme Court's satisfaction in *Phillips* with the availability of judicial review of tax liability seems shortsighted. In his recent concurring opinion in *Laing v. United States*, Mr. Justice Brennan concluded with regard to the termination assessment provision:

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51. 407 U.S. at 91-92.

52. See cases cited note 45 *supra*.

53. Note 44 and accompanying text *supra*.

54. *Stranglehold*, *supra* note 11, at 723.

55. See, e.g., *Iannelli v. Long*, 487 F.2d 317, 318 (3d Cir. 1973); *Transport Mfg. & Equip. Co. v. Trainor*, 382 F.2d 793, 799 (8th Cir. 1967); *Ginsburg v. United States*, 278 F.2d 470, 472-73 (1st Cir.), *cert. denied*, 364 U.S. 878 (1960); *Lloyd v. Patterson*, 242 F.2d 742, 743-44 (5th Cir. 1957); *Homan Mfg. Co. v. Long*, 242 F.2d 645, 655 (7th Cir. 1957); *Williams v. United States*, 373 F. Supp. 71, 75 (D. Nev. 1973). See also Kaminsky, *Administrative Law and Judicial Review of Jeopardy Assessments Under the Internal Revenue Code*, 14 TAX L. REV. 545 (1959).

56. INT. REV. CODE OF 1954, § 6851(a)(1) provides in pertinent part:

In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

[It] falls short in my view, of meeting due process requirements. . . .

. . . .  
. . . . However expeditiously the Tax Court handles [a] claim, that court is not required to decide the merits within any specified time, and no provision is made for a prompt preliminary evaluation of the basis for the assessment.<sup>57</sup>

### C. Remedies Presently Available

The Code presently affords several avenues for the jeopardy-assessed taxpayer to obtain a final determination of his tax liability and secure the return of his property. Close examination, however, reveals serious weaknesses in each of them.

#### 1. Posting bond

By posting a bond with the district director equal to the amount of the assessment,<sup>58</sup> a taxpayer can stay all action to collect a jeopardy assessment until the decision of the Tax Court becomes final.<sup>59</sup> Unless the taxpayer is quick enough to file the bond before his property is actually levied upon, the bond may be filed only with the consent of the district director.<sup>60</sup> Thus, since the Code allows the district director to levy immediately after the assessment and simultaneously demand full payment,<sup>61</sup> this remedy is normally only available to the jeopardy-assessed taxpayer at the pleasure of the district director.

Even if the taxpayer is permitted to post a bond, as a practi-

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57. 96 S. Ct. 473, 487 (1976).

58. Under the 1939 Code, the Commissioner could require that the bond be *double* the amount of the assessed deficiency. INT. REV. CODE OF 1939, ch. 1, § 273(f), 53 Stat. 85.

59. INT. REV. CODE OF 1954, § 6863(a) (jeopardy assessment); INT. REV. CODE OF 1954, § 6851(e) (termination assessment).

The decision of the Tax Court does not become final if either the taxpayer or the Commissioner files a petition for review in the court of appeals within three months, or while appeal is pending. INT. REV. CODE OF 1954, §§ 7481, 7483.

60. As required by INT. REV. CODE OF 1954, §§ 6851(e), 6863(a), regulations have been promulgated governing the filing of such bonds. For example, Treas. Reg. § 301.6863-1(a)(2) (1958) provides that a bond may be filed:

(i) At any time before the time collection by levy is authorized under section 6331(a), or

(ii) After collection by levy is authorized and before levy is made on any property or rights to property, or

(iii) In the discretion of the district director, after any such levy has been made and before the expiration of the period of limitations on collection.

61. The normal 10-day waiting period is inapplicable. Note 19 *supra*.

cal matter one may not be commercially available. Bonding companies generally require that a taxpayer have total assets substantially in excess of the amount assessed.<sup>62</sup> Most jeopardy-assessed taxpayers, however, cannot meet this requirement.<sup>63</sup> In addition, if the taxpayer's assets have already been distrained, he may be unable even to pay the cost of the bond.<sup>64</sup> This situation is improved only slightly by a case in which a district director was required to allow financially qualified friends of the taxpayer to act as sureties in lieu of the bond,<sup>65</sup> since few taxpayers are fortunate enough to have such friends.

Moreover, even the taxpayer who is permitted to post a bond, and who finds one commercially available, may discover that obtaining a bond has the same net effect as the levy itself. Often, especially for a release bond, liquid collateral must be posted with the bonding company. Thus, it is likely that the same property the IRS levied on, or an equal amount of cash will then be impounded as security for the bond, and the taxpayer will still be unable to use his property.<sup>66</sup>

## 2. *Voluntary abatement by the Service*

Because the Service was originally of the belief that it had no authority to revoke even a clearly mistaken jeopardy assessment,<sup>67</sup> Congress added a provision permitting total abatement of a jeopardy assessment if the Service later determines that

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62. Gould, *Jeopardy Assessments, When They May be Levied and What to Do about Them*, N.Y.U. 18TH INST. ON FED. TAX. 937, 944-45 (1960).

63. One author suggests that "[j]eopardy assessments are most often levied upon those whose assets allegedly do not cover their liabilities . . . ." *Stranglehold*, *supra* note 11, at 727.

64. This has led at least one court to label the bond remedy a "mockery":

In the instant case *every bit* of property (inclusive of bank accounts) of both taxpayers (and their wives) has been seized: it would seem to be mere mockery to say they, after they have been stripped of all assets, are protected in that they may either post a bond or pay the three hundred odd thousand dollars of taxes and penalties assessed in order to stay the waste of a forced sale of their assets and the certain destruction of their business.

Kimmel v. Tomlinson, 151 F. Supp. 901, 902 (S.D. Fla. 1957) (emphasis in original).

65. *Yoke v. Mazzello*, 202 F.2d 508, 510 (4th Cir. 1953). It had been the policy of that district office to accept only the surety bond of an approved bonding company or a deposit of personal property. In *Yoke*, the district collector was held to have abused his discretion by refusing to accept an offer by two friends of the taxpayer to act as sureties, where the two friends owned unencumbered real estate worth more than two times the amount of the assessment. *Id.*

66. See Alexander, *Wrongful Attachment Damages Must Be Fixed in the Original Suit*, 4 U. SAN FRAN. L. REV. 38, 40 (1960).

67. S. REP. NO. 730, 83d Cong., 1st Sess. 1 (1953).

jeopardy does not exist.<sup>68</sup> Further, a treasury regulation allows partial abatement when jeopardy does exist but the assessment is excessive.<sup>69</sup> Nevertheless, since the Code provision and treasury regulation do not contain formal procedural requirements for the handling of abatement requests, the outcome is still subject to the discretion of the same district director who made the original jeopardy determination and approved the assessment.<sup>70</sup> Since, in most cases, the district director will be reluctant to admit his error, this remedy is virtually useless to the jeopardy-assessed taxpayer. Since *Laing*, this same provision for abatement appears to be available (though equally useless) to the taxpayer whose jeopardy assessment follows termination of his taxable year.

### 3. Refund litigation

Another remedy available to the jeopardy-assessed taxpayer is refund litigation in a district court or the Court of Claims.<sup>71</sup> In order to bring a refund action, however, the taxpayer must first pay the full amount of the assessment,<sup>72</sup> either by raising the cash from relatives, friends, or other lenders,<sup>73</sup> or by authorizing the IRS to sell his seized assets and apply the proceeds to the assessment.<sup>74</sup> Once the tax has been paid, the taxpayer may file his claim for a refund with the Service,<sup>75</sup> but must wait six

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68. INT. REV. CODE OF 1939, §§ 273(a), 872(j), 1013(j), 67 Stat. 583 (now INT. REV. CODE OF 1954, § 6861(g)).

69. Treas. Reg. § 301.6861-1(c) (1957).

70. IRS procedures require that all jeopardy assessments be approved by the district director. CCH INT. REV. MANUAL § 5213.21(6) (1974).

71. The provisions governing taxpayer refund suits are found in INT. REV. CODE OF 1954, § 7422.

72. Payment in full of the alleged tax liability, no matter how exaggerated it is later determined to have been, is ordinarily a jurisdictional prerequisite to refund litigation in a district court or the Court of Claims. *Flora v. United States*, 362 U.S. 145 *passim* (1960). There is apparently one exception to this well-established rule:

If a taxpayer does not pay the full assessment for the terminated period, he may nevertheless sue for a refund provided he files returns for the terminated period and the full year. In this event, the returns open the terminated period and serve as an informal claim for a refund.

*Lewis v. Sandler*, 498 F.2d 395, 400 (4th Cir. 1974), citing *Irving v. Gray*, 479 F.2d 20, 24 & n.6 (2d Cir. 1973). Because *Irving* relied on the notion that a deficiency did not exist under these circumstances, this exception may be called into question by the holding in *Laing*, that termination of a taxable year does in fact result in a deficiency.

73. The taxpayer might be able to convince a third party to advance the cash needed to pay the assessment by giving the third party a security interest in the seized assets which the IRS would return upon payment of the assessment.

74. The process of public sale by the IRS is likely, however, to take much longer and produce less cash than a private sale of the assets by the taxpayer.

75. In the case of jeopardy assessment, the taxpayer can either make a formal claim

months thereafter to bring suit for the refund, unless the claim is denied sooner.<sup>76</sup> Thus, access to refund litigation is likely to require more delays than the jeopardy-assessed taxpayer, or his business, can stand.<sup>77</sup>

Occasionally, the government's jeopardy assessment will exceed the value of the taxpayer's assets,<sup>78</sup> or the Service will levy upon property which it is not obligated to credit against the taxpayer's tax liability.<sup>79</sup> In these circumstances, the refund litigation remedy is probably foreclosed to the taxpayer by the full payment requirement announced in *Flora v. United States*.<sup>80</sup>

#### 4. "Prepayment" Tax Court redetermination

After receipt of the statutory notice of deficiency, which may be as late as 60 days after a jeopardy assessment and seizure of property,<sup>81</sup> the taxpayer has 90 days to petition the Tax Court for a redetermination of his tax liability.<sup>82</sup> Although he does not have to "pay" the assessment to invoke the jurisdiction of the Tax Court, the Service will keep the taxpayer's property to secure payment of the jeopardy assessment until conclusion of the Tax Court proceeding, which may be as long as two years.<sup>83</sup> Therefore,

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for refund on Form 843, or file an amended return(s) for the year(s) covered by the jeopardy assessment showing more tax paid than was due. A termination-assessed taxpayer may file a formal Form 843 claim, or as discussed in note 72 *supra*, he may simply file returns for the short period and the full year.

76. INT. REV. CODE OF 1954, §§ 6532(a), 7422(a).

77. Where the taxpayer's business assets are seized and he is forced to suspend operations, the rapid loss of contracts, goodwill, etc. may render the business valueless by the time the taxpayer is vindicated in the courts.

78. This approach is often used in narcotics-related seizures of property. Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures*, 22 U.C.L.A. L. REV. 1191, 1192 (1975).

79. For example, the IRS may refuse to credit against the tax liability any property which is subject to forfeiture. *Id.* at 1199 & n.70. See, e.g., 15 U.S.C. § 1177 (1970) (forfeiture of gambling devices); 49 U.S.C. § 782 (1970) (forfeiture of carriers transporting contraband).

80. 362 U.S. 145 (1960). For a limited exception to the *Flora* rule see note 72 *supra*.

81. INT. REV. CODE OF 1954, § 6861(b). Note that a termination-assessed taxpayer is now entitled to the statutory notice of a deficiency, or 90-day letter. See notes 35-40 and accompanying text *supra*.

82. INT. REV. CODE OF 1954, § 6213(a).

83. Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures*, 22 U.C.L.A. L. REV. 1191, 1198 & n.62 (1975).

Sale of the taxpayer's assets by the IRS is stayed throughout the Tax Court proceeding, INT. REV. CODE OF 1954, § 6863(b)(3)(A), but unless the taxpayer posts a bond under § 6863(a) or § 6851(e) (discussed in text accompanying notes 58-65 *supra*), the IRS is under no obligation to return his assets.

the delays involved in Tax Court litigation may also prove ruinous to the taxpayer.

##### 5. Possible non-Code remedies

Because of the limited value of the remedies provided by the Code, taxpayers and their counsel have sought to devise additional remedial measures for summary assessments.<sup>84</sup> One such remedy is an action to enjoin an improper jeopardy assessment. The availability of injunctive relief could reduce the expense and delay involved in the other approaches to judicial review. Section 7421(a) of the Code, however, strictly prohibits suits to enjoin the collection of taxes.<sup>85</sup> Statutory exceptions to this rule are available where (1) the Service does not send the required statutory notice of deficiency within 60 days,<sup>86</sup> or (2) it is "apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim," and the taxpayer, having no adequate remedy at law, will be irreparably injured by the improper assessment.<sup>87</sup> The first exception offers little comfort to the

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84. Two such remedies are discussed in Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures*, 22 U.C.L.A. L. REV. 1191, 1200-08 (1975). In addition to the possibility of an action for injunctive relief, Tarlow suggests that a taxpayer who is quick enough might be able to overcome the problem of obtaining counsel by assigning his interest in seized funds to an attorney as compensation for legal services. The value of this remedy is limited, however, since the assignment will take priority over the federal tax lien only if it is made prior to levy by the IRS on the taxpayer's property, and also because of the ethical limits on the amount of an assignment that the attorney can accept as compensation for services. *Id.* at 1205-07 & n.5.

85. The Code's anti-injunction provision states that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . ." INT. REV. CODE OF 1954, § 7421(a). For a discussion of the few jeopardy and termination assessment cases giving favorable consideration to the possibility of injunctive relief see text accompanying notes 93-101 *infra*.

86. INT. REV. CODE OF 1954, § 6213(a) prohibits levy or other proceedings to collect the tax before notice [the 90-day letter] has been mailed to the taxpayer, during the 90-day period subsequent to notice, and during the pendency of any properly petitioned Tax Court proceeding. The section provides that:

Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

87. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962). The limited utility of the exception is described as follows:

We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. Otherwise, the District Court is without jurisdiction, and the complaint must be dismissed. To require more than



taxpayer, since the court may allow the IRS a short period following the court's ruling to send a deficiency notice before collection will actually be enjoined.<sup>88</sup> Also, as discussed earlier, even if one summary assessment is enjoined, the IRS is not barred from making another.<sup>89</sup> To date, the second exception has only been available to taxpayers in the most egregious of factual settings.<sup>90</sup>

## II. ABUSES OF THE SUMMARY ASSESSMENT POWERS

Perhaps due in part to the non-reviewability of the district director's jeopardy determination, the jeopardy and termination

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good faith on the part of the Government would unduly interfere with a collateral objective of the Act—protection of the collector from litigation pending a suit for refund. And to permit even the maintenance of a suit in which an injunction could issue only after the taxpayer's nonliability had been conclusively established might "in every practical sense operate to suspend collection of the . . . taxes until the litigation is ended."

*Id.* at 7-8. See also *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974); *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974).

In *Comm'r v. Shapiro*, 96 S. Ct. 1062 (1976), the Supreme Court made injunctive relief somewhat more accessible by holding that in such an action the IRS must disclose to the taxpayer the factual basis for the jeopardy assessment:

*Williams Packing* did not hold that the taxpayer's burden of persuading the District Court that the Government will under no circumstances prevail must be accomplished without any disclosure of information by the Government. It says instead that the question will be resolved on the basis of the information available to the Government at the time of the suit. Since it is absolutely impossible to determine what information is available to the Government at the time of the suit, unless the Government discloses such information in the District Court pursuant to appropriate procedures, it is obvious that the Court in *Williams Packing* intended some disclosure by the Government

*Id.* at 1071. The Court noted that such disclosure can be made through ordinary discovery procedures:

The Government may defeat a claim by the taxpayer that its assessment has no basis in fact—and therefore render applicable the Anti-Injunction Act—without resort to oral testimony and cross-examination. Affidavits are sufficient so long as they disclose basic facts from which it appears that the Government may prevail.

*Id.* at 1074. Following *Shapiro*, the IRS may no longer raise the Anti-Injunction Act defense by mere conclusory allegations of tax liability, in cases in which the taxpayer is able to meet the first test under *Williams Packing* (irreparable injury and lack of an adequate remedy at law).

Lately, this exception has played an important role in dealing with the Service's "Narcotics Project." See notes 91-97 and accompanying text *infra*.

88. See, e.g., *McGee v. United States*, 380 F. Supp. 801, 803 (N.D. Ind. 1974); *Williams v. United States*, 373 F. Supp. 71 (D. Nev. 1973).

89. Note 27 and accompanying text *supra*.

90. See, e.g., *Willits v. Richardson*, 497 F.2d 240 (5th Cir. 1974), discussed in text accompanying notes 91-97 *infra*; *Sherman v. Nash*, 488 F.2d 1081 (3d Cir. 1973), discussed in text accompanying notes 98-101 *infra*.

assessment powers have been the subject of several kinds of abuse. The term "abuse" is used here to indicate circumstances in which possible jeopardy to the collection of the revenue was not the true impetus for the summary assessment, and in fact may not have been considered.

#### A. *The IRS "Narcotics Project"*

Since 1971, the Service has embarked on a new program, entitled the "Narcotics Project," to "disrupt the distribution of narcotics through the enforcement of all available tax statutes,"<sup>91</sup> specifically the termination assessment power.<sup>92</sup> This project and its abuses may best be illustrated by the facts of *Willits v. Richardson*,<sup>93</sup> in which Sharon Willits sought injunctive relief against the IRS after seizure of her property.

Because of Ms. Willits' prior association with a suspected narcotics dealer, she was stopped by two narcotics officers of the Miami Police Department on May 24, 1973, while driving a borrowed automobile. As a result of Ms. Willits' refusal to give her current address and because of irregularities in the car registration (later found to be typographical errors), she was arrested for speeding, although she was taken to the *narcotics* section of the police station. While at the station and at the request of the officers, Ms. Willits opened her purse, revealing a pistol. She was arrested for carrying a concealed weapon without a permit, and advised of her constitutional rights. Upon a further search of her purse, the officers found some pills later determined to be barbituates, prescribed by her doctor. In addition to the pills, the officers found a gold coin, a small piece of jewelry, and an envelope containing initialed slips of paper and approximately \$4,400.00 in cash. At the request of the police, Ms. Willits also

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91. One of the earliest references to the project appears in the 1971 COMM'R OF INT. REV. ANN. REP. 36, which states:

Due to recent increases in narcotics trafficking, the President [Nixon] directed all Federal law enforcement agencies to cooperate in a program to combat traffickers and suppliers. The Treasury Department appointed a special task force to develop this program. The Intelligence and the Audit Divisions are now in the process of expanding their activity in this area. Efforts will be directed against middle and upper echelon distributors, wholesalers, and financiers involved in narcotics traffic for possible civil or criminal violations of the Internal Revenue Code.

*Id.*

92. Silver, *Terminating the taxpayer's taxable year: How IRS uses it against narcotics suspects*, 40 J. TAXATION 110 (1974).

93. 497 F.2d 240 (5th Cir. 1974).

surrendered some diamond rings she was wearing. The plaintiff was then formally charged with possession of narcotics, unlawfully carrying a concealed weapon, and speeding. She was later released on a \$2,000.00 bond.

The following day, May 25, 1973, one of the arresting officers advised Mr. John Zahurak of the IRS of Ms. Willits' arrest and her association with suspected narcotics dealers. After discovering that Ms. Willits had not filed tax returns for any of the four preceeding years, Mr. Zahurak speculated that Ms. Willits had earned commissions of \$60,000 on sales of \$240,000 of *cocaine* for 1973.<sup>94</sup> Zahurak then recommended to his superiors that Ms. Willits' tax year be terminated, that the tax due be demanded, and if necessary assessed, in the amount of \$25,549. At 3:20 p.m. on May 25, 1973, a notice, advising Ms. Willits that her taxable year had been terminated and that a tax of \$25,549 was due and payable, was sent to her by certified mail. About the same time an assessment of equal amount was made against Ms. Willits. On May 30, 1973, the IRS served a notice of levy upon the Miami Police Department, and seized all of Ms. Willits' property then in the possession of the Department.

On these facts, the Court of Appeals for the Fifth Circuit held that an injunction was appropriate as no evidence existed to indicate that Ms. Willits had ever dealt in cocaine. The seizure of her property was based upon a police officer's speculation and the fictitious assessment by Mr. Zahurak.<sup>95</sup> The court concluded that

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94. This computation was based upon the notations on one of the slips of paper found with the money, which supposedly represented one such drug transaction. *Id.* at 245.

95. Occasionally the estimates are so flimsy that the courts have granted injunctive relief. Several gambling cases provide good examples: *Lucia v. United States*, 474 F.2d 565, 575 (5th Cir. 1973) (the IRS estimated gross receipts for a betting season from one day's wagering slips); *Pizzarello v. United States*, 408 F.2d 579, 583-84 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969) (income over a five-year period was estimated from gambling receipts from three days, although the IRS could not establish that the taxpayer had operated as a gambler for five years or that the slips were typical of his income during that period); *Rinieri v. Scanlon*, 254 F. Supp. 469, 474 (S.D.N.Y. 1966) (the IRS presented no evidence that the taxpayer had even earned his money in the United States).

The Fifth Circuit in *Clark v. Campbell*, 501 F.2d 108, 111 & n.5, 117 n.28 (5th Cir. 1974), *cert. denied*, 96 S. Ct. 366 (1975), noted that a summary assessment against Clark exceeded the amount seized at the time of his arrest, in conformance with a pattern of arbitrary assessments. In *United States v. Rubio*, 404 F.2d 678, 680 (7th Cir. 1968), *cert. denied*, 394 U.S. 993 (1969), \$2,796 was seized from a narcotics suspect upon his arrest, his taxable year was terminated, and a deficiency equal to the exact amount of the seized funds was assessed. In *Rinieri v. Scanlon*, 254 F. Supp. 469, 474 (S.D.N.Y. 1966), an IRS agent testified that he had been ordered "to write a report that would come out with an income tax of approximately \$247,500 so that the government would have a basis [for] seizing" the taxpayer's money in that amount. *See also* *Aguilar v. United States*,

it could not allow this procedure to be used "as summary punishment to supplement or complement regular criminal procedures."<sup>96</sup>

Several other cases have condemned the clearly punitive motive behind this use of the termination assessment as outside the power's statutory purpose of protecting the collection of the revenue.<sup>97</sup> To date, however, there has been no indication that the Service intends to discontinue its "Narcotics Project."<sup>97.1</sup>

### B. Cooperation with the Justice Department

The facts of one recent case highlight the use of the Service and its summary assessment powers by other government agencies. In *Sherman v. Nash*,<sup>98</sup> the Justice Department had been investigating racketeering in New Jersey. When a key witness fled

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501 F.2d 127 (5th Cir. 1974); *Willits v. Richardson*, 497 F.2d 240 (5th Cir. 1974).

96. 497 F.2d at 246. See *Aguilar v. United States*, 501 F.2d 127, 130-31 (5th Cir. 1974).

97. Finding that the IRS had acted in "evident excess of statutory authority," the court in *United States v. Bonaguro*, 294 F. Supp. 750, 753-54 (E.D.N.Y. 1968), *aff'd sub nom. United States v. Dono*, 428 F.2d 204 (2d Cir.), *cert. denied*, 400 U.S. 829 (1970), concluded that the IRS

had not acted under the statute to protect the revenue interest and collect a tax that seemed to be in jeopardy, but had made a merely colorable use of the statutory forms at the suggestion of another agency of government in accordance with a pattern of conduct that is not strange to the courts.

In *Kabbaby v. Richardson*, 520 F.2d 334 (5th Cir. 1975), the court stated:

This case presents once again a pattern we have seen too often recently: arrest by local police, immediate notification of the IRS when drugs and a large amount of cash are found in the possession of the suspect, quick termination of the suspect's taxable year followed by a jeopardy assessment based on a totally insupportable extrapolation of taxes due from the drugs found, and seizure by the IRS of the cash and valuables then impounded at the police station. This Court has deplored these tactics . . . .

See *Aguilar v. United States*, 501 F.2d 127 (5th Cir. 1974); *Clark v. Campbell*, 501 F.2d 108 (5th Cir. 1974); *Lucia v. United States*, 474 F.2d 565 (5th Cir. 1973).

97.1. In a recent annual report, the IRS made the following comment on its "Narcotics Project" activities:

In 1974, the Service began a reevaluation of its participation in investigations of organized crime figures and narcotics traffickers to ensure that its criminal enforcement efforts were directed at the most significant violators of the income tax laws. While the Service will continue to cooperate with other Federal agencies in the conduct of investigations of criminals who have violated the tax laws and maintain a strong drive to enforce the tax laws against criminals, its efforts in the future depend, of course, upon available resources. These resources must be used in an efficient manner that will have the maximum possible impact on all who engage in criminal violations of the tax laws.

1974 COMM'R OF INT. REV. ANN. REP. 27.

98. 488 F.2d 1081 (3d Cir. 1973).

to the Bahamas to avoid testifying,<sup>99</sup> the Justice Department allegedly looked for a way to bring him back within the reach of service of process. The witness/taxpayer claimed that the solution eventually chosen was imposition of a jeopardy assessment and seizure of his property.<sup>100</sup> When he returned to the United States to defend his property against the Internal Revenue Service action, the taxpayer was immediately subpoenaed to testify in the Justice Department proceeding. Although the Court of Appeals for the Third Circuit disapproved the government's apparent total disregard for the power's statutory purpose of protecting the revenue and remanded the case for a determination of whether the alleged abuse took place,<sup>101</sup> such cooperation between government agencies will be difficult to eliminate except on a case-by-case basis.

### C. *Tolling the Statute of Limitations*

Ordinarily, there is a three-year statute of limitations applicable to the assessment and collection of taxes.<sup>102</sup> Occasionally, however, the Service is unable to complete its audit within this statutory period, and hence is unable to state accurately the amount of the deficiency and the grounds for its assessment. Reluctant to limit the assessment to the amount then provable,<sup>103</sup> the Service has sometimes "bought" an additional 60 days to determine the actual amount of the deficiency by making a jeopardy assessment.<sup>104</sup> Since the Code permits the jeopardy assessment to be in a different amount than the deficiency notice which is eventually sent,<sup>105</sup> the Service is free to make maximum use of new information unearthed during the 60-day period before no-

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99. *Id.* at 1083 n.5.

100. *Id.* at 1083.

101. *Id.* at 1085.

102. INT. REV. CODE OF 1954, § 6501(a). If the taxpayer fails to file a return, or willfully attempts to evade a tax, the tax may be assessed at any time. INT. REV. CODE OF 1954, § 6501(c)(2), (3). If a return omits more than 25 percent of property includible in gross income, the limitations period is six years. INT. REV. CODE OF 1954, § 6501(e).

103. The Service's reluctance to go to court prior to completion of the audit stems from the fact that the Tax Court has consistently placed the burden of proof on the Service whenever an additional deficiency is asserted. *See, e.g.,* Estate of Harry Schneider, 29 T.C. 940, 946 (1958); Kimbell-Diamond Milling Co., 10 T.C. 7, 13 (1948); Security First Nat'l Bank, 28 B.T.A. 289, 313 (1933).

104. The Service gains 60 days in this manner, not because the jeopardy assessment will immediately stop the running of the statute of limitations, but because the statutory notice of deficiency, stating the amount of the alleged deficiency, need not be sent until 60 days later. INT. REV. CODE OF 1954, § 6861(b).

105. Note 28 and accompanying text *supra*.

tice must be sent. This use of the jeopardy assessment power, though unrelated to the purpose underlying the summary assessment statutes,<sup>106</sup> has been upheld by the courts from a very early date,<sup>107</sup> apparently on the basis of two major premises: (1) the Service will seldom actually seize the taxpayer's property in cases in which "jeopardy" is not based on any acts of the taxpayer,<sup>108</sup> and (2) the courts generally regard statutes of limitations as matters of legislative grace, and therefore, in this instance, construe them strictly against the taxpayer.<sup>109</sup> Despite the courts' approval of this technique, as of the mid-1960's the Service claimed to have ceased the use of the jeopardy assessment power to suspend the statute of limitations.<sup>110</sup>

#### *D. Use For Leverage in Settlement Negotiations*

Because of its tremendous impact on the taxpayer, the threat of a summary assessment can be a powerful, if not unfair, bargaining tool in the hands of a revenue agent who reaches an impasse in settlement negotiations with a taxpayer. In one such case, the threat of a jeopardy assessment caused a group of eight taxpayers to deposit \$1,000,000 with a district director to be applied against a tax liability eventually stipulated by the Commissioner to be slightly more than \$100,000.<sup>111</sup> In the absence of judi-

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106. CCH INT. REV. MANUAL § 5213.21(2) (1974) provides that, pursuant to IRS policy statement P-4-89, a jeopardy assessment may be recommended when one or more of the following conditions exist:

(a) The taxpayer is or appears to be designing quickly to place his property beyond the reach of the Government either by removing it from the United States, or by concealing it, or by transferring it to other persons, or by dissipating it.

(b) The taxpayer is, or appears to be designing quickly to depart from the United States, or to conceal himself.

(c) The taxpayer's financial solvency is or appears to be imperiled. (This does not include cases where the taxpayer becomes insolvent by virtue of the accrual of the proposed assessment of tax, penalty and interest).

107. *Veeder v. Commissioner*, 36 F.2d 342, 343-44 (7th Cir. 1929); *Foundation Co. v. United States*, 15 F. Supp. 229, 246-48 (Ct. Cl. 1936).

108. *Stranglehold*, *supra* note 11, at 721.

109. *Id.*

110. *Id.* at 720 n.129. One provision of the ABA Section of Taxation's 1958 proposal to reform jeopardy assessment procedures would have specifically made imminent expiration of the statute of limitations an invalid basis for jeopardy. *Id.* at 734-35 & n.212.

111. *Fortugno v. Commissioner*, 353 F.2d 429, 433-35 (3d Cir. 1965), *cert. dismissed*, 385 U.S. 954 (1966). Upon recovering the balance of \$900,000, the taxpayers sought to recover interest on that amount for the period that it was held by the Service. Both the Tax Court and the Third Circuit Court of Appeals denied the claim for interest on the ground that the deposit was not an "overpayment in respect to any internal revenue tax" within the contemplation of INT. REV. CODE OF 1939, § 3771(a). *Id.* at 433-35.

cial review of the jeopardy determination, this subtle form of abuse is extremely difficult to police and is unlikely to disappear.

### *E. Potential for Use as a Political Weapon*

The summary assessment powers present a particularly serious threat to unpopular political groups. In 1956, for example, the jeopardy assessment power was used against the Communist Party<sup>112</sup> and its newspaper, the *Daily Worker*.<sup>113</sup> These incidents point out the peculiar vulnerability of such organizations to the devastating effects of summary assessments. Most such groups operate on a marginal basis and are unable to weather the loss of contributions which naturally follows on the heels of a summary assessment.<sup>114</sup> At the same time, their questionable financial stability could itself be used as the justification for a summary assessment. This extreme vulnerability could be exploited against the wide range of radical, dissident, and merely unorthodox groups which have heretofore enjoyed the beneficent protection of the Constitution.<sup>115</sup>

The propensity of a recent President to order vigorous audits to harass his "political enemies"<sup>116</sup> raises the specter of the use of summary assessment powers against individuals. If such "enemies" can be harmed by the use of the audit power, they might be completely immobilized, silenced, and ruined by abuse of the summary assessment powers.

## III. CONTROL OF THE POWERS

In 1966, although there were 104,077,987 returns filed,<sup>117</sup> there were only 279 jeopardy assessments made covering 636 taxable years.<sup>118</sup> Thus, the summary assessment powers are invoked

112. *Communist Party of the United States v. Moysey*, 141 F. Supp. 332 (S.D.N.Y. 1956).

113. *Publishers New Press, Inc. v. Moysey*, 141 F. Supp. 340 (S.D.N.Y. 1956).

114. Where the summary assessment is large and the organization's total assets may not be enough to satisfy it, further receipts from contributors will be seized as they come in. Contributions dry up quickly when donors realize that their donations are likely to go directly into the United States Treasury to satisfy the assessment. In the normal assessment situation, on the other hand, they may rationalize that either someone else's dollars, or only a small portion of their own, are being used to pay the tax.

115. Indeed, harsh enforcement of the tax laws against political groups may constitute a deprivation of their members' First Amendment rights. See *Stranglehold*, *supra* note 11, at 733.

116. Kuttner, *The taxing trials of I.R.S.*, N.Y. Times, Jan. 6, 1974, § 6 (Magazine), at 8.

117. 1966 COMM'R OF INT. REV. ANN. REP. 34.

118. *Stranglehold*, *supra* note 11, at 717 n.113.

against only a tiny majority of American taxpayers. Nevertheless, because of the devastating effect of summary assessments on the affected taxpayers, the practice cannot be dismissed as insignificant. Moreover, the continuing abuse of the powers indicates that present controls over their use are inadequate, and that additional restraints are needed.

In arriving at suitable control measures, it is necessary to achieve a balance between two important but opposing policy objectives: (1) the need to protect the revenue,<sup>119</sup> and (2) the need to extend to taxpayers the due process protections provided in other contexts.<sup>120</sup>

At the outset, it should be noted that the first policy goal, protecting the revenue, has long been recognized as an important governmental objective<sup>121</sup> and is not to be ignored. If taxpayers could freely evade payment of taxes by concealing their assets or leaving the country, the entire tax collection system would be threatened, and with it the continued functioning of our government. Hence, summary assessment powers in some form clearly have a place in our system of taxation. Yet the history of abuses suggests that protection of the revenue may have been given too much weight in the past, ignoring the need for due process protections entirely. Since neither extreme is appropriate, some accommodation of both policy objectives is called for.

### A. *The Jeopardy Determination*

#### 1. *Problems of control*

Perhaps the most significant failing of the present summary assessment procedures is the general unavailability of review of the district director's original finding of jeopardy.<sup>122</sup> One important reason cited by the courts for the unavailability of review is

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119. See *Phillips v. Commissioner*, 283 U.S. 589, 594-95 (1931).

120. Notes 53-57 and accompanying text *supra*.

121. See, e.g., *Phillips v. Commissioner*, 283 U.S. 589, 594-95 (1931).

122. The courts have generally held that the existence of jeopardy to the revenue is a determination solely within the discretion of the district director, and not subject to judicial review. Authorities cited note 55 *supra*. The only exceptions have been in *Sherman*, see notes 98-101 and accompanying text *supra*, in which the taxpayer was able to demonstrate that there had been no genuine finding of jeopardy at all, and several of the narcotics cases, see notes 95-97 *supra*, in which the courts found that the IRS estimates of tax liability were so reckless and lacking in factual basis as to constitute harassment. Note, however, that the Supreme Court, in *Comm'r v. Shapiro*, note 87 *supra*, has recently ruled that the IRS must now disclose to the taxpayer the factual basis for the jeopardy assessment.



the absence in the jeopardy assessment provision, and the inadequacy in the termination provision,<sup>123</sup> of objective standards against which to judge the district director's exercise of discretion.<sup>124</sup> Thus, any plan to establish adequate controls over the exercise of the summary assessment powers must necessarily provide for the creation of standards to guide the proper exercise of those powers. The following proposal is one approach to achieving objective standards while preserving needed flexibility.<sup>125</sup>

## 2. *Proposal for creation of standards*

First, the summary assessment provisions in the Code itself should be drawn more narrowly, to delineate the kinds of circumstances which justify the use of summary assessment powers. The present termination assessment provision<sup>126</sup> describes two specific situations which mandate the termination of a taxable year, but concludes with a third guideline broad enough to open the door to the kinds of abuses discussed earlier.<sup>127</sup> The jeopardy assessment provision offers no such guidelines at all. In addition to specifying the conditions which trigger IRS application of the summary assessment provisions, Congress should require the district director to have "probable cause" to believe that those conditions exist,<sup>128</sup> rather than the mere unsubstantiated "belief"

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123. INT. REV. CODE OF 1954, § 6851(a)(1) (termination assessments) contains standards for determining jeopardy, but no court has yet applied them to restrain the IRS:

If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceeding taxable year unless such proceedings be brought without delay. . . .

124. See, e.g., *Veeder v. Commissioner*, 36 F.2d 342, 345 (7th Cir. 1929), in which the court stated that review was precluded partly because of the "absence of statutory standards by which any reviewing body may test the correctness of the belief of the Commissioner."

125. Arguments could be made in support of Congress, the judiciary, or the IRS itself promulgating standards. The most practical solution, however, appears to be the one suggested here: a combination of all three, with each of these bodies assuming a distinct role of its own.

126. INT. REV. CODE OF 1954, § 6851.

127. This broad guideline allows a termination assessment to be made whenever a taxpayer does "any other act tending to prejudice or to render wholly or partially ineffectual proceedings to collect the income tax . . . ." INT. REV. CODE OF 1954, § 6851(a)(1) set forth in note 123 *supra*. *Contra*, Gustafson, *Judicial Review of Jeopardy Tax Collection: Sentence First, Verdict Afterwards*, 26 CASE W. RES. L. REV. 315, 364 (1976).

128. Mr. Justice Brennan recently suggested the probable cause standard for jeopardy determinations in his concurring opinion in *Laing v. United States*, 96 S. Ct. 473,

that is presently required.

Second, the Code provisions should include a requirement that the IRS promulgate specific standards or guidelines further circumscribing the application of the summary assessment powers. The present Treasury Regulations governing summary assessments<sup>129</sup> are largely a restatement, sometimes in even broader terms, of the Code provisions.

The availability of specific standards would make two kinds of judicial review of summary assessments possible. First, the judiciary could, given an appropriate challenge, examine the regulations promulgated by the IRS to determine whether their terms were in harmony with the scope and intent of the Code provisions enacted by Congress. Second, under the *Accardi* doctrine that a governmental agency must carefully observe its own rules,<sup>130</sup> the facts of the particular case could be examined to ascertain whether there had been actual compliance with the published regulations.<sup>131</sup>

Only if precise standards are developed as suggested here, will procedural changes to permit judicial review of the jeopardy determination have any real meaning.

### B. Procedural Reforms

With adequate standards to guide the jeopardy determination, two approaches to judicial intervention in the summary assessment process are possible: the courts could review the jeopardy determination prior to levy and seizure, or alternatively,

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487 (1976). Deriving the standard from *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975), a prejudgment garnishment case, Mr. Justice Brennan stated that "the governing due process principle obliges IRS to provide a prompt hearing at which IRS must prove 'at least probable cause' for its claim." The Court referred to the "probable cause" standard in the jeopardy assessment context again, even more recently, in *Comm'r v. Shapiro*, 96 S. Ct. 1062, 1074 (1976).

129. Treas. Reg. §§ 1.6851-1 to 301.6863-2. The sole exceptions are the regulations governing termination of taxable years of departing aliens. Treas. Reg. § 1.6851-2, T.D. 6620, 1962-2 CUM. BULL. 347.

130. See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

131. This doctrine has recently been applied to the IRS in the area of tax fraud investigations. In both criminal and civil fraud cases, evidence has been excluded because it was not obtained in compliance with an IRS press release which stated that all special agents would give taxpayers under investigation a *Miranda*-type warning at the time of their first meeting. *United States v. Sourapas*, 515 F.2d 295, 298 (9th Cir. 1975); *United States v. Leahey*, 434 F.2d 7 *passim* (1st Cir. 1970); *United States v. Heffner*, 420 F.2d 809, 811-12 (4th Cir. 1969). See also *Romanelli v. Commissioner*, 466 F.2d 872 (7th Cir. 1972); Comment, *Miranda and the IRS: Protecting the Taxpayer by Administrative Due Process*, 24 AM. U.L. REV. 751 (1975).

provide a post-seizure review of the district director's finding of jeopardy.

### 1. *Pre-seizure relief*

a. *Prior hearing.* Conceivably, the summary assessment and collection steps could be separated. The district director could first make the assessment, notify the taxpayer of the deficiency, and demand payment. Then, only after a judicial hearing in which the taxpayer could challenge the jeopardy determination, could the Service proceed to seize the taxpayer's property in satisfaction of the assessment. This approach would afford full due process protection to the taxpayer, yet no matter how quickly the Service was able to obtain judicial authorization to collect, the prior notice to the taxpayer would often enable him to conceal his assets or flee the country before collection. Thus, by overemphasizing the due process policy objective, the prior hearing solution is no better balanced than the present system under the Code.

b. *Ex parte affidavit procedure.* To avoid the self-defeating aspects of prior notice to the taxpayer, the IRS could be required to obtain a judicial determination of jeopardy on an *ex parte* basis. This procedure would be similar to the requirement that a police officer demonstrate to the satisfaction of a magistrate the existence of probable cause to issue an arrest or search warrant. Some precedent for the use of this approach prior to the seizure of a debtor's assets may be found in the Louisiana sequestration statute recently upheld by the Supreme Court in *Mitchell v. W.T. Grant Co.*<sup>132</sup> There, a writ of sequestration was available upon a creditor's verified affidavit before a neutral judicial officer.<sup>133</sup> Application of such an *ex parte* approach in the summary assessment area would allow the IRS to protect the revenue, yet reduce the likelihood of the abuses that have resulted from the exercise of unfettered discretion by the district director.

### 2. *Post-seizure review*

a. *Immediate post-seizure hearing.* If, in the interest of

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132. 416 U.S. 600 (1974).

133. The Court in *Mitchell* noted that the determinative facts in the judge's decision on whether or not to issue the writ of sequestration, thereby allowing seizure of the property involved, are "ordinarily uncomplicated matters that lend themselves to documentary proof." *Id.* at 609. Although the jeopardy determination may require more elaborate proof and the formal presentation of evidence, this could also be accomplished in an *ex parte* hearing.

protecting the revenue, the taxpayer cannot be provided an opportunity to participate in a hearing prior to seizure of his property, an immediate post-seizure hearing would afford substantial due process protection without jeopardizing collection of the revenue. In *Mitchell*, the Supreme Court upheld a creditor's seizure of a debtor's property without prior notice or hearing, where the applicable statute provided that the debtor could obtain an immediate post-seizure hearing. At the hearing, the judge was empowered to order return of the debtor's property and assess damages unless the creditor could prove the grounds for the seizure.<sup>134</sup> A similar procedure could be adopted in the summary assessment area by permitting the taxpayer to obtain an immediate post-seizure hearing, solely on the issue of jeopardy, in the nearest district court.<sup>135</sup> If no jeopardy to the collection of the revenue existed, the court would invalidate the assessment and return the taxpayer's property. If the court sustained the IRS jeopardy determination, the taxpayer could still resort to Tax Court or refund litigation to dispute the amount of his tax liability.

b. *Equitable relief.* At present, suits for either injunctive or declaratory relief are statutorily prohibited.<sup>136</sup> Although, as previously discussed, a few exceptions to the anti-injunction provision have emerged in the summary assessment area,<sup>137</sup> those cases generally involve the most compelling of circumstances and are of no use to most summary-assessed taxpayers.

Equitable relief for summary-assessed taxpayers was proposed in 1958 by the American Bar Association Section of Taxation.<sup>138</sup> Under the A.B.A. proposal, the taxpayer could challenge the jeopardy determination in an expedited action for declaratory judgment.<sup>139</sup> If the district court ruled in the taxpayer's favor, it would vacate and annul the jeopardy assessment.<sup>140</sup> Even

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134. *Id.* at 606.

135. A similar approach was included in the 1958 ABA proposal for declaratory relief. Notes 138-39 and accompanying text *infra*.

136. Suits to enjoin the collection of any tax are barred by INT. REV. CODE OF 1954, § 7421, while 28 U.S.C. § 2201 (1970) prohibits declaratory judgment actions in respect of any tax.

137. Notes 91-101 and accompanying text *supra*.

138. Discussed in *Stranglehold*, *supra* note 11, at 733-35. The proposal was introduced in the House of Representatives in 1965 as H.R. 11450, 89th Cong., 1st Sess. §§ 87-88 (1965).

139. Any action pursuant to the proposed provision would have been "entitled to a preference on the calendar pursuant to the rules of the district court having jurisdiction of the proceeding." H.R. 11450, 89th Cong., 1st Sess. § 88 (1965).

140. The proposed section read, in pertinent part:

if the district director's jeopardy determination were sustained, the district court would be empowered to release some of the taxpayer's property to him for certain enumerated purposes.<sup>141</sup>

The A.B.A. proposal recognizes that the normal bars to suit against the Commissioner for declaratory or injunctive relief,<sup>142</sup> ordinarily necessary to ensure the orderly collection of the revenue, must be abolished in the extraordinary case of summary assessment and collection. The reasonableness of this exception is suggested first by the miniscule number of taxpayers involved,<sup>143</sup> and second by the fact that the Service, having already seized the taxpayer's property, holds the upper hand. Although introduced in Congress in 1965, the A.B.A.'s proposed amendments to the Code have never been enacted.

#### IV. THE 1975 SUMMARY ASSESSMENT REFORM BILL

In the fall of 1975, following a study of summary assessment procedures by the Joint Committee on Internal Revenue Taxation,<sup>144</sup> the House Ways and Means Committee concluded that because of the sudden and harsh effects of the summary procedures,

a taxpayer should be able to obtain judicial review of the propriety of a jeopardy assessment or a termination of a taxable year on an expedited basis and also that assets levied on by reason of any jeopardy assessment or termination of a taxable

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Upon such review, if the court decides that the taxpayer has, by a fair preponderance of the evidence, proved that the assessment or collection of the deficiency will not be jeopardized by delay, the court shall vacate and annul the assessment . . . and it shall be void and of no effect.

*Id.*

141. INT. REV. CODE OF 1954, § 6861 would have been amended under the proposal to permit the court to release sufficient assets to enable the taxpayer:

(1) to retain the services of legal counsel and to provide for other necessary expenses in the representation of the taxpayer in all matters, civil, criminal, or both, relating to or affecting the tax liability asserted in the jeopardy assessment; (2) to repair, maintain and preserve property . . . (3) to pay taxes (except taxes covered by the jeopardy assessment) owing by the taxpayer whether due before or after the making of said jeopardy assessment.

H.R. 11450, 89th Cong., 1st Sess. § 87 (1965).

142. Note 136 *supra*.

143. Text accompanying notes 117-18 *supra*.

144. STAFF OF JOINT COMM. ON INTERNAL REVENUE TAXATION, COMM. ON WAYS AND MEANS, 94TH CONG., 1ST SESS., JEOPARDY AND TERMINATION ASSESSMENTS, ADMINISTRATIVE SUMMONS, COMPREHENSIVE ADMINISTRATIVE PACKAGE, STATE CONDUCTED LOTTERIES, AND MISCELLANEOUS (Comm. Print 1975).

year should not be sold prior to or during the pendency of this judicial review.<sup>145</sup>

The Ways and Means Committee therefore reported out, as part of the Tax Reform Bill of 1975,<sup>146</sup> a provision which would provide a significant additional remedy for jeopardy and termination assessed taxpayers.<sup>147</sup>

#### A. *New Procedure for Expedited Tax Court Review*

The proposed amendment to the present summary assessment statutes would add a section 6866 to the Code,<sup>148</sup> thereby

145. HOUSE WAYS AND MEANS COMM., REPORT ON THE TAX REFORM BILL OF 1975, H.R. REP. NO. 658, 94th Cong., 1st Sess. (1975); also reported in 62 CCH 1975 STAND. FED. TAX REP., Special No. 4, Part 2 at 303 (No. 53, Nov. 15, 1975).

146. H.R. 10612, 94th Cong., 1st Sess. (1975) [hereinafter cited as H.R. 10612] was reported out of the House Ways and Means Committee on November 12, 1975. H.R. REP. NO. 658, 94th Cong., 1st Sess. (1975).

147. H.R. 10612 § 1209(a); see note 148 *infra*. The present version of the Act has an effective date of December 31, 1975. H.R. 10612 § 1209(d). Since this date has passed without enactment of the bill, a new effective date will be necessary for a final version of the Act.

148. H.R. 10612 § 1209(a) reads as follows:

(a) REVIEW OF JEOPARDY AND TERMINATION ASSESSMENT PROCEDURES BY TAX COURT—Subchapter A of chapter 70 (relating to jeopardy) is amended by adding at the end thereof the following new part:

“PART III—REVIEW OF TERMINATION OF TAXABLE PERIOD AND JEOPARDY ASSESSMENT PROCEDURES BY TAX COURT

“Sec. 6866. REVIEW BY TAX COURT.

“(a) FILING OF PETITION.—Within 30 days after the day on which there is notice and demand for payment under section 6861(a) or 6862(a) or notice of termination of a taxable period under section 6851(a), the taxpayer may file a petition with the Tax Court for a determination under this section.

“(b) DETERMINATION BY TAX COURT.—Within 20 days after a petition is filed under subsection (a) with the Tax Court, the Tax Court shall determine whether or not—

“(1) there was reasonable cause for making the assessment under section 6861 or 6862 or declaring the termination of the taxable period under section 6851, as the case may be,

“(2) the amount so assessed or demanded was appropriate under the circumstances, and

“(3) There is reasonable cause for rescinding (in whole or in part) the action taken under section 6861, 6862, or 6851, as the case may be.

“(c) EXTENSION OF 20-DAY PERIOD WHERE TAXPAYER SO REQUESTS.—If the taxpayer requests an extension of the 20-day period set forth in subsection (b) and establishes reasonable grounds why such extension should be granted, the Tax Court may grant an extension of not more than 40 additional days.

“(d) COMPUTATION OF DAYS.—For purposes of this section, Saturday, Sunday, or a legal holiday in the District of Columbia shall not be counted as the last day of any period.

providing a new procedure for expedited review of the district director's jeopardy determination. Within 30 days following informal notice of either a jeopardy assessment or a termination assessment, the taxpayer could petition the Tax Court for review.<sup>149</sup> Further, the new provision would require the Tax Court to determine the validity of the district director's jeopardy determination within 20 days after the petition had been filed.<sup>150</sup>

The expedited review provided under the proposed Code section would not constitute, nor replace, the present formal Tax Court redetermination of tax liability.<sup>151</sup> The new expedited review in the Tax Court would be limited to determining the reasonableness of (1) making the summary assessment in the first place, and (2) the amount of the summary assessment.<sup>152</sup> First, by requiring the Tax Court to "determine whether or not . . . there was reasonable cause for making the [jeopardy] assessment . . . or declaring the termination of the taxable period,"<sup>153</sup> the amendment would for the first time allow a taxpayer to force the IRS to justify its decision to make a summary assessment. Second, proposed section 6866 would authorize the Tax Court to determine whether the amount of the summary assessment was "appropriate under the circumstances."<sup>154</sup> This would not entail an inquiry into the true tax liability, but would involve a judicial determination of whether, given only the facts available to the IRS at the time of the assessment, the assessment and underlying

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"(e) COMMISSIONERS.—The chief judge of the Tax Court may assign proceedings under this section to be heard by the commissioners or the court, and the court may authorize a commissioner to make the determination of the court with respect to such proceeding, subject to such conditions and review as the court may by rule provide.

"(f) FINALITY OF DETERMINATION.—Any determination made by the Tax Court under this section shall be final and conclusive and shall not be reviewed in any other court."

149. Proposed § 6866(a), note 148 *supra*.

150. Proposed § 6866(b), note 148 *supra*.

151. HOUSE WAYS AND MEANS COMM., REPORT ON THE TAX REFORM BILL OF 1975, H.R. REP. NO. 658, 94TH CONG., 1ST SESS. (1975), also reported in 62 CCH 1975 STAND. FED. TAX REP., Special No. 4, Part 2 at 304 (No. 53, Nov. 15, 1975), states:

A determination made under new section 6866 will have no effect upon the determination of the correct tax liability in a subsequent proceeding. The proceeding under the new provision is to be a separate proceeding which is unrelated, substantively and procedurally, to any subsequent proceeding to determine the correct tax liability, either by action for refund in a Federal district court or the Court of Claims or by a proceeding in the Tax Court.

152. Proposed § 6866(b)(1) & (2), note 148 *supra*.

153. Proposed § 6866(b) & (b)(1), note 148 *supra*.

154. Proposed § 6866(b)(2), note 148 *supra*.

estimate of income were reasonable.<sup>155</sup> If, on the basis of this limited review, the Tax Court found that the summary assessment was unjustified or excessive, it would be empowered to rescind the assessment in whole or in part.<sup>156</sup>

The new provision expressly bars sale of the taxpayer's seized property until the day after the expedited Tax Court review of the jeopardy determination, or if no petition is filed, the day following the end of the 30-day filing period.<sup>157</sup> This new language is probably unnecessary, however, since under the present system sale is normally stayed at least through the end of the 90-day filing period following issuance of the statutory notice of deficiency.<sup>158</sup> Another section of the Tax Reform Bill of 1975, applicable to all assessments including summary assessments, would exempt a minimal portion of the taxpayer's wages or salary from IRS levy and distraint procedures.<sup>159</sup> This expansion of the taxpayer's ex-

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155. HOUSE WAYS AND MEANS COMM., REPORT ON THE TAX REFORM BILL OF 1975, H.R. REP. NO. 658, 94th Cong., 1st Sess. (1975); also reported in 62 CCH 1975 STAND. FED. TAX REP., Special No. 4, Part 2 at 304 (No. 53, Nov. 15, 1975), states:

In determining whether the amount assessed was appropriate under the circumstances, the Tax Court is not expected to attempt to determine ultimate tax liability. Rather, the issue to be determined is whether, based on the information then available to the Internal Revenue Service, the amount of the assessment is reasonable. Thus, for example, in the absence of other evidence made available to the Internal Revenue Service before the hearing, an estimate of the taxpayer's liability to date based on information in fact available to the Internal Revenue Service will be presumed to be reasonable.

156. Proposed § 6866(b)(3), note 148 *supra*.

157. H.R. 10612, § 1209(c) provides:

(c) STAY OF SALE OF SEIZED PROPERTY PENDING TAX COURT DETERMINATION UNDER SECTION 6866.—Section 6863 (relating to stay of collection of jeopardy assessments) is amended by adding at the end thereof the following new subsection:

“(c) STAY OF SALE OF SEIZED PROPERTY PENDING TAX COURT DETERMINATION UNDER SECTION 6866.—

“(1) GENERAL RULE.—Where a jeopardy assessment has been made under section 6861(a) or 6862(a), or a taxable period has been terminated under section 6851(a), the property seized for the collection of the tax shall not be sold—

“(A) if a petition is filed in accordance with section 6866(a), before the day after the day on which the Tax Court makes its determination in the proceeding, or

“(B) if subparagraph (A) does not apply, before the day after the expiration of the period provided in section 6866 for filing the petition with the Tax Court.

“(2) EXCEPTIONS.—With respect to any property described in paragraph (1), the exceptions provided by clauses (i) and (iii) of subsection (b)(3)(B) shall apply.”

158. See note 30 *supra*.

159. H.R. 10612, § 1210, provides in part:



(a) GENERAL RULE.—Subsection (a) of section 6334 (relating to property exempt from levy) is amended by adding at the end thereof the following new paragraph:

“(9) MINIMUM EXEMPTION FOR WAGES, SALARY, AND OTHER INCOME.—Any amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any period, to the extent that the total of such amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d).”

(b) DETERMINATION OF EXEMPT AMOUNT.—Section 6334 is amended by adding at the end thereof the following new subsection:

“(d) EXEMPT AMOUNT OF WAGES, SALARY, OR OTHER INCOME.—

“(1) INDIVIDUALS ON WEEKLY BASIS.—In the case of an individual who is paid or receives all of his wages, salary, and other income on a weekly basis, the amount of the wages, salary, and other income payable to or received by him during any week which is exempt from levy under subsection (a)(9) shall be—

“(A) \$50, plus

“(B) \$15 for each individual who is specified in a written statement which is submitted to the person on whom notice of levy is served and which is verified in such manner as the Secretary shall prescribe by regulations and—

“(i) over half of whose support for the payroll period was received from the taxpayer,

“(ii) who is the spouse of the taxpayer, or who bears a relationship to the taxpayer specified in paragraphs (1) through (9) of section 152(a) (relating to definition of dependents), and

“(iii) who is not a minor child of the taxpayer with respect to whom amounts are exempt from levy under subsection (a)(8) for the payroll period.

For purposes of subparagraph (B)(ii) of the preceding sentence, ‘payroll period’ shall be substituted for ‘taxable year’ each place it appears in paragraph (9) of section 152(a).

“(2) INDIVIDUALS ON BASIS OTHER THAN WEEKLY.—In the case of any individual not described in paragraph (1), the amount of the wages, salary, and other income payable to or received by him during any applicable pay period or other fiscal period (as determined under regulations prescribed by the Secretary) which is exempt from levy under subsection (a)(9) shall be an amount (determined under such regulations) which as nearly as possible will result in the same total exemption from levy for such individual over a period of time as he would have under paragraph (1) if (during such period of time) he were paid or received such wages, salary, and other income on a regular weekly basis.”

.....  
(d) LEVY ON WAGES, ETC., TO BE CONTINUING.—

(1) Subsection (d) of section 6331 (relating to levy on salaries and wages) is amended by adding at the end thereof the following new paragraph:

“(3) CONTINUING LEVY ON SALARY AND WAGES.—

“(A) EFFECT OF LEVY.—The effect of a levy on salary or wages payable to or received by a taxpayer shall be continuous from the date such levy is first made until the liability out of which such levy arose is satisfied or becomes unenforceable by reason of lapse of time.

“(B) RELEASE AND NOTICE OF RELEASE.—With respect to a levy described in subparagraph (A), the Secretary shall promptly release the levy when the liability out of which such levy arose is satisfied or becomes unenforceable by reason of lapse of time, and shall promptly notify the person upon whom such levy was made that such levy has been released.”

emptions does little, however, to improve the woefully inadequate existing exemptions from levy.<sup>160</sup>

Finally, proposed section 6866 would allow the chief judge of the Tax Court to delegate the determination of cases under the section to commissioners of the court, subject to such conditions and review as the court may provide.<sup>161</sup> The Tax Court's official ruling on any such case, however, "shall be final and conclusive and shall not be reviewed in any other court."<sup>162</sup>

### *B. Strengths and Weaknesses of Proposed Section 6866*

The proposed amendment provides for post-seizure judicial review of the district director's jeopardy determination. As discussed earlier, this approach is superior to a pre-seizure notice-type hearing in giving force to the general policy of protecting the revenue.<sup>163</sup> At the same time, the new section would introduce a greater degree of due process protection into the summary assessment procedures by specifically providing for judicial inquiry into the reasonableness of the district director's finding of jeopardy. In addition, by expediting the process of review, the provision would significantly reduce the detriment to the taxpayer resulting from seizure of his assets prior to his day in court. Although the taxpayer's filing period to obtain the limited Tax Court review is reduced from the normal 90 days<sup>164</sup> to only 30,<sup>165</sup> the taxpayer is not required to wait for the statutory notice of deficiency to obtain the limited review authorized by the proposed section. By promptly filing, the taxpayer could obtain a decision on the merits of the jeopardy determination in three weeks or less.<sup>166</sup>

On the other hand, the proposed section is deficient in a number of respects. Most significantly, the amendment still provides no standards for the jeopardy determination. The House Ways and Means Committee report on the bill suggests that this omission was intentional:

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160. See note 10 *supra* which sets forth the present exemptions from levy.

161. Proposed § 6866(e), note 148 *supra*.

162. Proposed § 6866(f), note 148 *supra*. This provision is plainly intended to serve the same general purpose as the § 7421 anti-injunction statute: preventing interference with the orderly collection of the revenue. Proposed § 6866(f) would accomplish this purpose by foreclosing the possibility of protracted court appeals.

163. Section III, B, 1, *a supra*.

164. Notes 5-8 and accompanying text *supra*.

165. Proposed § 6866(a), note 148 *supra*.

166. Proposed § 6866(b), note 148 *supra*.

The committee believes that the general standards set forth in the Internal Revenue Manual relating to the conditions which must exist before a jeopardy or termination assessment is made are reasonable.<sup>167</sup>

The Ways and Means Committee report seems to confer a greater dignity on the internal guidelines provided to IRS agents than they have heretofore enjoyed. Indeed, the courts have simply ignored their existence in declaring that no judicial review of the jeopardy determination is available because no standards exist.<sup>168</sup>

Even if the Internal Revenue Manual does contain adequate standards on which to base judicial review of the jeopardy determination, this approach still involves serious problems. First, absent congressional restrictions in the Code, the IRS can freely alter these standards to suit its current needs without regard to whether the altered guidelines ultimately serve the purposes intended by Congress. Second, there is some doubt that, under the current case law, the IRS can even be compelled to follow these unpublicized internal guidelines, since the cases applying the *Accardi* doctrine to the tax area involved an IRS rule which was widely publicized in a press release.<sup>169</sup> In any event, although the new provision will provide for judicial scrutiny of the jeopardy determination, judicial interpretation of the standards set in the Internal Revenue Manual may still give the Service rather broad discretion.

Another deficiency in the proposed amendment is the continuing lack of any requirement that the taxpayer be informed of his right to seek redress. The taxpayer's need to be so informed is particularly acute under the proposed amendment since his right to an expedited review will expire if not exercised within 30 days.<sup>170</sup> To correct this deficiency, the informal notice which triggers the running of the 30-day filing period<sup>171</sup> should inform the taxpayer of (1) his right to obtain limited Tax Court review, (2) the means by which he may petition the Tax Court, and (3) the fact that he has only 30 days in which to act.<sup>172</sup> In some cases,

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167. HOUSE WAYS AND MEANS COMM., REPORT ON THE TAX REFORM BILL OF 1975, H.R. REP. NO. 658, 94th Cong., 1st Sess. (1975); also reported in 62 CCH 1975 STAND. FED. TAX REP., Special No. 4, Part 2 at 304 (No. 53, Nov. 15, 1975).

168. Note 124 *supra*.

169. Notes 130-31 and accompanying text *supra*.

170. Proposed § 6866(a), note 148 *supra*.

171. *Id.*

172. In *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 602 (1974), the Supreme Court sustained the lower courts' requirement that the writ of sequestration served upon the

failure to provide such notice might effectively deprive a taxpayer of the proposed remedy.

The merits of alternative measures (*e.g.*, a pre-seizure *ex parte* probable-cause-type hearing) have already been explored.<sup>173</sup> The fact that the proposed amendment does not adopt every possible taxpayer protection should not obscure the fact that it does provide for judicial intervention in the jeopardy determination process. While any summary assessment, particularly a wrongful one, places an onerous burden on the taxpayer no matter how short its duration, Tax Court review of the reasonableness of the summary assessment would place a significant limitation on the heretofore largely unfettered discretion of the IRS.

## V. CONCLUSION

The summary assessment powers are a powerful tool, and potential weapon, in the hands of the Internal Revenue Service. To date, the policy of protecting the revenue has completely overridden ordinary notions of due process in the use of these procedures. Consequently, there is an urgent need for immediate and fundamental reform of the summary assessment powers. The proposal currently before Congress will go a long way toward creating the proper balance between protection for the revenue and due process protection for the taxpayer. Although the original A.B.A. proposal to reform the jeopardy assessment procedure did not become law, hopefully the 1975 bill, covering all types of summary assessments, will receive more favorable consideration in Congress.<sup>174</sup>

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debtor be accompanied by notice of his right to seek dissolution of the writ and of the fact that he must "file a pleading or make appearance in the First City Court of the city of New Orleans within five days."

173. See section III, B, 1, *b supra*.

174. On December 4, 1975, H.R. 10612 was passed by the House of Representatives with a few amendments not pertinent here, and on December 5, 1975, was referred to the Senate Finance Committee. Hearings were held in the Senate on December 9, 1975. As of March 24, 1976, no further action had been taken. 2 CCH CONG. INDEX 5098 (94th Cong. 1975-76).